Dayang Kayang Dawila v Mahkamah Anak Negeri, Lahad Datu

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO T(25) 2 OF 2004
LINTON ALBERT J
1 MARCH 2005

Civil Procedure — Certiorari — Application for — Applicant is a non-Malaysian — Whether applicant had locus standi — Whether there was breach of natural justice

These proceedings concerned birds' nests in several caves located at Madai in Kunak and at Segalong in Semporna. The applicant was the daughter of one Datu Abdullah Dawila who claimed to the rights over the birds' nests in those caves since the days before Sabah became a part of Malaysia. The applicant claimed to have inherited those rights from her father as demonstrated by the decision of the Mahkamah Anak Negeri, Lahad Datu given in her favour regarding the caves. The issue to be determined related to the power of attorney executed by the applicant's father authorising one Datuk Asibi Agasi to collect his share from the yearly sale of edible birds' nests found in the caves and Datuk Asibi Agasi had in turn surrendered all the powers in the power of attorney to the applicant. By the letter addressed to the director of the Wild Life Department, the respondent declared the surrender to be invalid and rejected the applicant's rights purported to be conferred by the surrender. The applicant sought the court's intervention and asked for an order of *certiorari* to quash the decision made by the respondent.

Held, allowing the application with costs:

(1) The contention that the applicant had no *locus standi* because she was a non-Malaysian was devoid of substance. Our courts have never been known to deny the right of a party to appear and be heard simply because the party is a non-citizen; what was required was that the litigant must possess an interest in the issues raised in the proceedings: *United Engineering (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12. The applicant's claim to rights over birds' nests had been impinged by the decision of the respondent and therefore by no stretch of the imagination could it be said that she had no interest in the issues raised in these proceedings. Accordingly, the applicant had the standing to appear and be heard (see para 3).

(2) There was clearly a breach of natural justice because the alleged right of the applicant over the birds' nests was adversely affected by the respondent's decision which was made arbitrarily and unfairly without according the applicant the right to be heard. The respondent's impugned decision was therefore unsustainable and was accordingly quashed (see para 7).

[**Bahasa Malaysia summary**

Prosiding ini adalah berkenaan sarang-sarang burung di beberapa gua-gua di Madai, Kunak dan Segalong, Semporna. Pemohon adalah anak perempuan seorang Datu Abdullah Dawila yang menuntut hak-hak ke atas sarang-sarang burung di dalam gua-gua tersebut sejak dari sebelum Sabah menjadi sebahagian dari Malaysia. Pemohon mendakwa bahawa beliau mewarisi hak-hak tersebut dari bapanya sebagaimana yang ditunjukkan oleh keputusan Mahkamah Anak Negeri, Lahad Datu yang memihakkan kepadanya berhubung dengan gua-gua tersebut. Apa yang perlu diputuskan oleh mahkamah ini adalah berhubung dengan surat kuasa wakil yang disempurnakan oleh bapanya yang memberi kuasa kepada seorang Datuk Asibi Agasi untuk memungut bahagiannya dari hasil jualan tahunan sarang-sarang burung yang boleh dimakan yang dijumpai di gua-gua tersebut dan Datu Asibi Agasi pula telah menyerahkan kesemua kuasa-kuasa di bawah surat kuasa wakil tersebut kepada pemohon. Melalui surat kepada pengarah Jabatan Hidupan Liar, responden mengisytiharkan bahawa penyerahan tersebut tidak sah dan menolak hak-hak pemohon yang dikatakan telah diberikan melalui penyerahan tersebut. Pemohon memohon mahkamah untuk mencelah dan memohon untuk perintah *certiorari* membatalkan keputusan yang dibuat oleh responden.

Diputuskan, membenarkan permohonan itu dengan kos:

(1) Dakwaan yang pemohon tidak mempunyai *locus standi* kerana beliau bukanlah seorang rakyat Malaysia adalah tidak berasas. Mahkamah-mahkamah kita belum pernah menafikan hak sesuatu pihak untuk hadir dan didengar hanya kerana pihak tersebut bukan warganegara; apa yang perlu adalah litigan tersebut mesti mempunyai kepentingan di dalam isu-isu yang dibangkitkan di dalam prosiding tersebut*: United Engineering (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12. Tuntutan pemohon untuk hak-hak terhadap sarang-sarang burung tersebut telah dicerobohi oleh keputusan responden dan dengan itu beliau tidak boleh dikatakan tidak mempunyai kepentingan di dalam isu-isu yang dibangkitkan di dalam prosiding ini. Oleh yang demikian, pemohon berhak untuk hadir dan didengar (lihat perenggan 3).

(2) Secara jelas ini adalah merupakan satu pengingkaran keadilan asasi kerana hak-hak pemohon terhadap sarang-sarang burung tersebut telah dijahanamkan oleh keputusan responden yang dibuat secara sembarangan dan tidak adil tanpa memberi hak kepada pemohon untuk didengar. Keputusan responden dengan itu tidak boleh dikekalkan dan dengan itu dibatalkan (lihat perenggan 7).]

Notes

For cases on certiorari generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1474–1492.

Cases referred to

District Council Central Province Wellesley v Yegappan [1960] 2 MLJ 77 (refd)
Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang [1988] 2 MLJ 85 (refd)
United Engineering (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12 (refd)

Legislation referred to

Native Courts Enactment 1992

Hamid Hamzah Mydin (Amin Jaafar & Co) for the applicant.
Julita Gumpil (State Attorney General's Chambers) for the respondent.

Linton Albert J:

[1] The facts that gave rise to these proceedings concern birds' nests in several caves located at Madai in Kunak and at Segalong in Semporna. The applicant one Dayang Kayang Dawila is the daughter of one Datu Abdullah Dawila whose claim to rights over the birds' nests in those caves since the days before Sabah became a part of Malaysia and was then called British North Borneo, is not disputed. The applicant claims to have inherited those rights from her father as demonstrated by the decision of the Mahkamah Anak Negeri, Lahad Datu on 14 February 2001 given in her favour regarding the caves at Segalong in Semporna fortified by a letter from the same court dated 22 June 2002 and followed by yet another letter dated 12 January 2004 by the Mahkamah Anak Negeri, Kunak reiterating her right to the birds' nests there. The applicant complains that her right to harvest the birds' nests has been hampered by other claimants as well as the relevant government department overseeing the caves but this does not concern the court in these proceedings. What the court has to determine, however, relates to the power of attorney executed by the applicant's father on 3 June 1958 authorising one Datuk Asibi Agasi to collect his share from the yearly sale of edible birds' nests found in the caves at Segalong and Datu Asibi Agasi had in turn surrendered all the powers in the power of attorney to the applicant. By the letter dated 29 March 2004 addressed to the director of the Wild Life Department the respondent declared the surrender to be invalid and rejected the applicant's rights purported to be conferred by the surrender. The applicant is now seeking the court's intervention and is asking for an order of *certiorari* to quash the decision made by the respondent set out in the letter dated 29 March 2004 the relevant parts of which are as follows:

> Justeru itu, selaku pemegang amanah kepada pewarisan sarang burung dan berdasarkan kepada adat istiadat suku kaum Idahan dan selaku ketua daerah mahkamah anak negeri Lahad Datu, setelah meneliti dan mengenal pasti terhadap dokumen diri yang dipegang oleh Pn Dayang Kayang Dawila (Passport No KK641087) adalah bercanggah dengan enakmen mahkamah anak negeri 1992 dan bukan bertaraf bumiputra. Oleh yang

demikian berdasarkan kepada enakmen mahkamah anak negeri 1992, mahkamah anak Negeri Lahad Datu dengan ini menolak sebarang penyerahan dan tuntutan terhadap hak-hak pewarisan sarang burung yang dimaksudkan oleh Haji Datu Asibi bin Datu Agasi kepada Pn Dayang Kayang Dawila.

[2] The application is supported by several grounds, the most notable of which is to the effect that there was a breach of natural justice because the respondent did not conduct any hearing nor initiate any process or procedure before making the impugned decision. The justification advanced for the impugned decision is set out in the affidavit in reply affirmed by one Abidin bin Tukang, who was the very person who signed the letter dated 29 March 2004 containing the impugned decision. The relevant averments in the affidavit in reply are as follows:

1 I, Abidin bin Tukang, am the Ketua Daerah Hal Ehwal Anak Negeri, given the authority to adjudicate as judge of the Mahkamah Anak Negeri Lahad Datu, an agency of the State Government of Sabah, the respondent named herein.

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4 I am advised by my solicitor and verily believe it to be true that no proceedings was held before me or was ever applied for by the applicant for the adjudication to the subject matter of this application which is, the surrender of power by Datu Asibi bin Datu Agasi to the applicant as referred to exh 'DK-6'ofthe said applicant's affidavit and to deny the applicants rights of succession to the birds nest in the caves of Madai and Segalong (the said birds nest) at all material time. As such, the action for Judicial Review by the applicant herein is misconceived.

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13 I have found that the applicant is a non native and is not a bumiputra. Hence, the applicant is a non qualified under the Interpretation (Definition of Native) Ordinance (Sabah Cap. 64) and granting rights will be in contravention of the Native Courts Enactment 1992. I am advised by my solicitor and verily believe it to be true that the applicant is also an non Malaysia citizen bearing a foreign passport No Kota Kinabalu 641087. In the circumstances, the application submitted together with the purported power of attorney is void ab initio and/or ineffective for execution under the native Courts Enactment1992.

[3] Puan Julita Gumpil of counsel for the respondent submitted that the respondent had in fact made no decision because there was no proceeding before the respondent for a decision to be made. I find no merit whatsoever in this convoluted argument because it is abundantly clear from the letter dated 29 March 2004 that there was a decision adversely affecting the rights of the Applicant. The contention that the applicant has no locus standi because she is a non-Malaysian is a proposition that is as startling as it is devoid of substance. Our courts have never been known to deny the right of party to appear and be heard simply because the party is a non-citizen; what is required is that the litigant must possess an interest in the issues raised in the proceedings (per Abdul Hamid CJ in *United Engineering (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 at p 39). Here, the applicant's claim to rights over birds' nests have been impinged by the decision of the respondent and therefore by no stretch of the imagination can it be said that she has no interest in the issues raised in these proceedings. Accordingly, the applicant has the standing to appear and be heard.

[4] The question whether the applicant being a non-citizen can have access to a Native Court is a totally different and irrelevant matter in these circumstances. The argument that the application for judicial review is inappropriate because the applicant has not exhausted all avenues provided by the Native Courts Enactment 1992 must also fail because it runs counter to the principle laid down in *Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85 where Hashim Yeop A Sani, CJ had this to say at p 87:

> It would seem beyond question that it is now settled law that it is not an inflexible rule that where there is an appeal provision however elaborate in the relevant statute (which an aggrieved person can take advantage of), leave for an order of certiorari should automatically be refused. It was held in *Government of Malaysia v Jagdish Singh* that the court has a discretion to issue an order of *certiorari* if it can be shown that there is a lack of jurisdiction or there is a blatant failure to perform some statutory duty or there is a breach of natural justice. Therefore, the existence of an elaborate appeal provision in the law concerned is not a conclusive ground to refuse leave.
>
> The underlying principle should always be remembered that the jurisdiction of the High Court to grant an order of certiorari is supervisory in character and is exerdsable over all inferior tribunals. The Native Courts are creatures of statute and the High Court can exercise control over the Native Courts through the prerogative orders.

[5] Finally, learned counsel for the respondent relied on the judgment of Abdul Aziz J in *District Council Central Province Wellesley v Yegappan* [1960] 2 MLJ 77 where at pp 181–182 his Lordship quoted with approval a passage in the book entitled *Judicial Review of Administrative Action* which stated that:

> *Certiorari* will issue to quash the decision of a statutory ribunal if an error of law is apparent on the face of the record, but not if the error is one of fact unless the error goes to the tribunal's jurisdiction.

[6] With respect, judicial activism has since liberated this remedy from the strictures imposed by authorities such as the one cited by learned counsel for the respondent. In my judgment the correct principle to be applied is that which is laid down in *Laugan Tarki*'s case.

[7] In these circumstances, there was clearly a breach of natural justice because the alleged right of the applicant over the birds' nests was undoubtedly adversely affected by the respondent's letter dated 29 March 2004, a decision which was made arbitrarily and unfairly without according the Applicant the right to be heard.

[8] The respondent's impugned decision is therefore unsustainable and is accordingly quashed. It must be understood, however, that this finding does not determine one way or the other the propriety or otherwise of the applicant's rights allegedly upheld by the respondent's decisions prior to the one made on 29 March 2004 as this question does not fall to be considered in these proceedings. I have, therefore, not dwelt on the various relevant statutory enactments dealt with extensively by learned counsel for the respondent and by Hamid Hamzah Mydin learned counsel for the spplicant.

[9] I have for the reasons aforesaid, allowed the application with costs.

Application allowed with costs.

Reported by Peter Ling